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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RAYMOND GARCIA PEREZ, Defendant and Appellant.	F070534 (Super. Ct. No. SC065759A) **OPINION**

THE COURT[*]

APPEAL from an order of the Superior Court of Kern County. Michael G. Bush, Judge.

Michael Satris, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Paul E. O'Connor, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Gomes, Acting P.J., Detjen, J. and Smith, J.

Appellant Raymond Garcia Perez appeals from the trial court's denial of his petition for resentencing pursuant to Penal Code section 1170.126.[1] He contends the court abused its discretion in denying his petition because: (1) it failed to state reasons; and (2) it applied the wrong standard in determining whether he posed a danger to the community if resentenced. We affirm.

FACTS

In 1996, a jury convicted Perez of driving under the influence of alcohol with priors (Veh. Code, §§ 23152, subd. (a), 23175) and driving under the influence with a blood alcohol content of .08 or greater (Veh. Code, § 23152, subd. (b)). Perez also pled guilty to driving while his driving privilege was suspended (Veh. Code, § 14601.5, subd. (a)), and allegations that Perez had four prior convictions within the meaning of the Three Strikes Law (§ 667, subds. (b)-(i)) were found true.

On June 18, 1996, Perez was sentenced to an indeterminate term of 25 years to life.

On August 16, 2013, Perez filed a petition for resentencing pursuant to section 1170.126.

On August 15, 2014, the district attorney filed an opposition to the petition.

On September 9 and 10, 2014, the court held a hearing on the petition.

On October 31, 2014, the court denied the petition through a minute order that did not contain a statement of reasons for the decision.[2]

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[1] All further statutory references are to the Penal Code, unless otherwise indicated.

[2] We have omitted a recitation of the evidence presented at the hearing; the facts underlying the court's decision are not germane to issues Perez raises.

DISCUSSION

The Failure to State Reasons

Introduction

The Three Strikes Reform Act of 2012 (Proposition 36 or the Act) created a postconviction release proceeding for third strike offenders serving indeterminate life sentences for crimes that are not serious or violent felonies. In order to be eligible for resentencing as a second strike offender under the Act, the inmate petitioner must satisfy the three criteria set out in subdivision (e) of section 1170.126.[3] (*People v. Superior Court* (*Martinez*) (2014) 225 Cal.App.4th 979, 989.) If the inmate satisfies all three criteria, as did Perez, he or she "shall be resentenced [as a second strike offender] unless the court, in its discretion, determines that resentencing the [inmate] would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f); *People v. Yearwood* (2013) 213 Cal.App.4th 161, 168.) In exercising this discretion, "the court may consider: [¶] (1) The [inmate's] criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes; [¶] (2) The [inmate's] disciplinary record and record of rehabilitation while incarcerated; and [¶] (3) Any other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in

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3 Section 1170.126, subdivision (e) provides: "An inmate is eligible for resentencing if: [¶] (1) The inmate is serving an indeterminate term of life imprisonment imposed pursuant to paragraph (2) of subdivision (e) of Section 667 or subdivision (c) of Section 1170.12 for a conviction of a felony or felonies that are not defined as serious and/or violent felonies by subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7. [¶] (2) The inmate's current sentence was not imposed for any of the offenses appearing in clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12. [¶] (3) The inmate has no prior convictions for any of the offenses appearing in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clause (iv) of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12.

an unreasonable risk of danger to public safety." (§ 1170.126, subd. (g).) The Act does not require the court to state reasons for its decision to grant or deny a petition for resentencing.

Analysis

Perez contends that, under the Act, petitioners have a legitimate expectation they will be resentenced and that expectation can only be defeated by a judicial determination of unreasonable danger. He additionally contends that resentencing a petitioner under the Act "to a second-strike term 'is the rule rather than the exception,' " i.e., that there is a presumption that resentencing will be granted. Perez further contends that because the denial of a petition under the Act involves the deprivation of a liberty interest, the state and federal constitutions (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7) require certain procedural protections, including a statement of supporting reasons, for the denial. We disagree.

In *People v. Edwards* (1976) 18 Cal.3d 796, the defendant contended that a sentencing judge must, in all instances, state his reasons for denying probation when the denial is contrary to a recommendation therefor. (*Id.* at p. 798.) In rejecting this contention, the Supreme Court stated,

> "[A] properly administered probation program not only serves society in effecting desirable rehabilitative goals [citation], but also insures that important rights are not denied to any person convicted of a crime.
>
> "Although we have required a statement of reasons for denial of an application for parole release [citation], the circumstances which made it fundamentally unfair to fail to state reasons for the denial in that context do not, for the reasons which next follow, pertain in the instant case. Adult Authority hearings which deal with parole matters are administrative in nature and afford far fewer procedural safeguards than in the case of judicial proceedings for the determination of punishment for criminal conduct after a finding of guilt. [Citation.] Because of the very absence of such procedural safeguards, including the lack of counsel and a fully documented record, the opportunity for an inmate to challenge arbitrary or capricious action by the Adult Authority may well be severely infringed.

> Without a statement of reasons for the denial of an application for parole, for instance, it is unlikely that an inmate can state a prima facie case necessary to gain even a review of claimed arbitrary action by the Adult Authority. [Citation.]
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> "A denial of probation, on the other hand, is a judicial act rendered with the full panoply of procedural protections. The court is provided with a report of the probation officer containing information of the defendant's background, his prior involvements, if any, with law enforcement agencies, his propensities and dispositions, his future plans if probation is granted, and the judge is required to verify that he has read and considered such report which often contains communications both favorable and unfavorable to defendant. The defendant is afforded an opportunity to present probation counselors with out-of-court character testimony and explanations of guilt, and he is afforded the benefit of counsel at all stages of the proceedings if he so desires, including the presence of an attorney at the probation and sentencing hearing. The judgment of the court is appealable and a complete record of proceedings is provided for appellate review. Unlike the situation following the denial of an application for parole there is thus an unconditional right of review which is not dependent upon reasons stated by the trial court for the denial of a grant of probation. We are unable to discern that merely by reason of an absence of such a statement an unfairness which offends procedural due process concepts results. Fundamental fairness to the defendant is otherwise assured in entertaining a direct appeal on a full judicial record." (*Id*. at pp. 802-803.)

Here, Perez was provided a full panoply of procedural protections with respect to his petition for resentencing—he was represented by counsel, he was provided a hearing on his petition where he could present evidence and cross examine witnesses against him, the court was provided with an abbreviated probation report and copies of reports relating to his past offenses, and he had the benefit of an appeal on a full judicial record that allows for a review of the trial court's decision.

Perez contends *Edwards* is not controlling because it involved a case in which denial of probation was presumed because it could not be granted absent a finding of unusual circumstances, whereas in the instant case there is an expectation or presumption that resentencing will occur. According to Perez, this creates a greater need for the court "to state the facts and reasons that overcame this presumption and supported the requisite

finding of unreasonable risk[.]" He also contends that a petitioner under the Act is afforded something less than "a full panoply" of procedural safeguards because they are not entitled to a probation report (*People v. Franco* (2014) 232 Cal.App.4th 831). Perez further contends that despite the procedural safeguards afforded a petitioner under the Act, there is no way to determine whether in denying the petition the court applied the correct standard of "unreasonable danger to public safety," which is contained in Proposition 47, because of the court's failure to state reasons. (See *post*.) We reject these contentions.

Although *Edwards* involved a case where the defendant was ineligible for a grant of probation without a finding of unusual circumstances, this circumstance was not germane to or mentioned by the court in its analysis. Further, although Proposition 36 petitioners are not entitled to a probation report, they are entitled to other important procedural safeguards, they can apprise the court of any relevant information that would have been included in the probation report during the hearing on the petition, and, in any event, the court here was provided with a current probation report for Perez as well as several other reports relating to his past offenses.

Moreover, there is no expectation or presumption that a petitioner under the Act will be sentenced to a second strike sentence. This contention by Perez is based on the "shall"/"unless" formulation employed in subdivision (f) of section 1170.126. We have previously rejected such a contention (*People v. Buford* (2016) 4 Cal.App.5th 886, 901-903, review granted January 11, 2017, S238790) and Perez offers no compelling reason to depart from that holding.[4] The Act does not create an expectation or presumption that under its provisions a petitioner under the Act would be resentenced as a second striker.

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[4] Perez points to an article written by "two leading authorities" on both the original Three Strikes "regimen" and its reform by the Act in which they assert that the intent of Proposition 36 is that inmates will be entitled to resentencing in all but the rarest cases involving true risk to public safety. This material does not help Perez because it finds no support in either the language of section 1170.126 itself or in the ballot materials related

Furthermore, as discussed in the next section, the standard "unreasonable danger to public safety" contained in Proposition 47 is not the standard the court should apply in ruling on a petition for resentencing under the Act. Therefore, a statement of reasons is unnecessary to determine if the court applied the correct standard in ruling on a petition for resentencing under the Act. Accordingly, we further conclude that the court was not required to state its reasons for denying Perez's Proposition 36 petition for resentencing.

The "Unreasonable Risk to Public Safety" Standard

On November 4, 2014, voters enacted Proposition 47, the Safe Neighborhoods and Schools Act (Proposition 47). It went into effect the next day. (Cal. Const., art. II, § 10, subd. (a).) Insofar as is pertinent here, Proposition 47 renders misdemeanors certain drug- and theft-related offenses that previously were felonies or "wobblers," unless they were committed by certain ineligible defendants. Proposition 47 also created a new resentencing provision—section 1170.18— by which a person currently serving a felony sentence for an offense that is now a misdemeanor may petition for a recall of that sentence and request resentencing in accordance with the offense statutes as added or amended by Proposition 47. (§ 1170.18, subd. (a).) A person who satisfies the criteria in subdivision (a) of section 1170.18 shall have his or her sentence recalled and be "resentenced to a misdemeanor … unless the court, in its discretion, determines that

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to Proposition 36. For instance, although the "Argument in Favor of Proposition 36" stated the measure had been "carefully crafted … so that truly dangerous criminals" would receive no benefits from the Act (Voter Information Guide, Gen. Elec. (Nov. 6, 2012) argument in favor of Prop. 36, p. 52), it did not suggest dangerousness would properly be found only in rare cases. Thus, the authors' intent is not a reliable indicator of what voters intended. (See *People v. Garcia* (2002) 28 Cal.4th 1166, 1175-1176, fn. 5; *California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 699–701; *Carleson v. Superior Court* (1972) 27 Cal.App.3d 1, 9, fn. 11; see also *People v. Rizo* (2000) 22 Cal.4th 681, 685.) Rather, the statutory language and ballot materials suggest voters intended resentencing would be denied in any case in which it would pose an unreasonable risk of danger to public safety, and they entrusted to their local judges the discretion to make that determination.

resentencing the petitioner would pose an unreasonable risk of danger to public safety." (*Id*. subd. (b).)

Perez argues section 1170.18, subdivision (c) now limits a trial court's discretion to deny resentencing under the Act to those cases in which resentencing the defendant would pose an unreasonable risk he or she will commit a new "super strike" offense. Again, we have previously rejected such a contention (*People v. Buford*, *supra*, 4 Cal.App.5th at pp. 903-913) and Perez offers no compelling reason to depart from that holding.

Since there is no merit to either of Perez's appellate contentions, we also conclude that the court did not abuse its discretion when it denied his petition for resentencing pursuant to the Act.

DISPOSITION

The order is affirmed.